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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77 – 534

UNITED STATES OF AMERICA, EX REL
ELEANOR CHASE
Petitioner,

vs.

RONALD WALD AND HAYDEN THOMPSON
Respondents.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorneys for Respondents

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## REASONS FOR NOT GRANTING THE WRIT

The Decision of the Tenth Circuit in U.S. Ex Rel Whitehorse v. Briggs, 555 F.2d 283 (1977) Is Clearly Erroneous.

The Tenth Circuit found no conflict between 25 U.S.C. Section 179 and 25 C.F.R. Section 151.24 stating:

> "We fail to see that there is any real conflict between the statute and the Secretary's regulation and believe the regulation is a valid exercise of the Secretary's authority." (Citations omitted). United States Ex Rel. Whitehorse v. Briggs, 555 F.2d 283, 288 (1977).

In reaching this conclusion the Tenth Circuit violated the primary principle to be followed in statutory construction. A statute is to be construed in light of its purpose. Haggar Company v. Helvering, 308 U.S. 389, 394 (1940).

Section 179 was enacted to protect Indian land from trespassing livestock by levying upon the livestock owners a penalty. This penalty has remained the same under Section 179 since its origin, a flat rate of $1.00 per animal. See Ash Sheep Co. v. United States, 252 U.S. 160, 167 (1920).

The statutory penalty serves the function of warning trespassing animals' owners that

they are to be penalized regardless of, and in addition to being held accountable for any actual damages caused by their roving livestock. The statute was not intended to enrich the Indian landowner with a windfall, but to protect him by insuring that damages to his land would be recoverable from a trespassing animal's owner in addition to a penalty in an amount clearly denominated.

Courts have consistently interpreted Section 179 as a penal statute. Connolly v. United States, 149 F.2d 666, 668 (9th Cir. 1945); United States v. Fraser, 156 F. Supp. 144, 147 (D. Mont. 1957); affirmed 261 F.2d 282 (9th Cir. 1958).

Penal statutes are to be "strictly construed". United States v. Emmons, 410 U.S. 396 (1973); Connolly v. United States, supra at 149 F.2d 669 where the court stated:

> "...(S)tatutes imposing penalties are strictly construed and pleadings to recover statutory penalties are likewise strictly construed. Furthermore, where the statute, as here, provides a remedy for collection of a penalty, that remedy must be followed in form." (footnote omitted).

The statute referred to was Section 201 of Title 25 of the United States Code. If a remedy must be followed "in form", is it not likewise necessary that the penalty, the

recovery of which that remedy provides for, be itself followed in form? The words of Section 179 set out the "form" of the penalty in language which interpreted in its ordinary, everyday sense, assesses upon the owner of trespassing cattle a penalty of one dollar for each animal that trespasses on Indian land. There is no language, ordinary or extraordinary, everyday or unusual, which assesses a penalty of more than one dollar for each trespassing animal. Yet the Tenth Circuit upheld Section 151.24 which purports to authorize the assessment of a larger penalty than is provided under Section 179. Clearly Section 179 does not authorize a penalty of one dollar per day and because it does not, the regulation is inconsistent with it and therefor invalid. As stated by the Eighth Circuit at 557 F.2d 157, 161:

> "As this case demonstrates, it is one thing to penalize a person $1.00 per head with respect to livestock which he permits to trespass on the lands of another and a quite different thing to penalize him $1.00 per head for the duration of the trespass. That difference must have been as obvious to the Congress in 1834 and again in 1873 as it is to us today, and Congress has never seen fit to change the statute although presumably it has been aware that damages to Indian grazing lands by trespassing cattle and sheep present a more serious problem than was presented in the early or even in the late 19th Century.

> There is simply no basis in the statute for the per diem penalty that the Secretary has undertaken to impose by his 1969 regulation, and we hold that to the extent that the regulation imposes a penalty in excess of the $1.00 per head called for by Section 179, it is invalid . . ."

Moreover, any doubt whether Section 179 does authorize a penalty of $1.00 per day, should be resolved in favor of the smaller penalty in accordance with the principal enunciated by the Third Circuit in Hatfried, Inc. v. Commissioner of Internal Revenue, 162 F2d 628, 633 (3rd Cir. 1947):

> "...(I)t is well settled that in the application of penalties 'all questions in doubt must be resolved in favor of those from whom the penalty is sought.' Crawford Statutory Construction, Section 240 p. 462."

Section 151.24 calls for a cumulative penalty which is not provided for in Section 179. That same principle of strict construction of a penal statute in favor of the one against whom the penalty is to be imposed, is also applicable to determine whether cumulation of a statutory penalty is proper. Bolles v. Outing Company, 175 U.S. 262 (1899).

Even where a penal statute provided that "every" offense was subject to penalty,

the cumulation of such penalties was deemed impermissible. People v. Spencer, 94 N.E. 614, 615 (N.Y. 1911). The purpose for the penalty was:

> "...to administer a warning not to continue the acts complained of. Generally, the purpose of the Legislature will be sufficiently subserved, when one violation, or one default, is recovered for, which shall act as a deterrent upon continuing to disregard the statute."

Similarly, with regard to Section 179, Congress believed that its intent to protect the Indian and deter the owner from further violation of Section 179 would be sufficiently subserved by the statutory assessment of a non-cumulative penalty of $1.00 per head of trespassing cattle. The cumulation provided for in the regulation is, according to basic principles of statutory construction, clearly impermissible. The Tenth Circuit violated the basic principles of statutory construction in upholding the validity of the regulation.

Indeed, in upholding the regulation, the Tenth Circuit encourages Indian plaintiffs to refrain from reporting trespass or otherwise using initiative to protect their land from trespassing cattle, by authorizing penalties to accumulate into enormous amounts simply by sitting back and allowing a long time to elapse before bringing the

trespass to the attention of the authorities or instituting actions. If the legislature intended such an anomalous situation it would have stated so clearly. Congress has provided for cumulated penalties in clear, unambiguous language. See for eg. 15 U.S.C. 45(e); 21 U.S.C. 23.

## CONCLUSION

The Tenth Circuit erred in upholding the authority of the Secretary to promulgate Section 151.24. We therefore request that the petition for a writ be denied.

Dated this 17th day of October, 1977.

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STATE OF N. DAK.)
) ss AFFIDAVIT OF SERVICE
COUNTY OF CASS ) BY MAIL

Joan Horn, being first duly sworn, deposes and says that on October 26, 1977, she served the attached BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT upon Richard B. Collins, Jeanne S. Whiteing and Judith A. Atkinson, counsel for Petitioner, by placing a true and correct copy thereof in an envelope addressed as follows:

Richard B. Collins
Jeanne S. Whiteing
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

Judith A. Atkinson
North Dakota Legal Services
Box 217
New Town, North Dakota 58763

and depositing the same, with postage prepaid, in the United States mails at Fargo, North Dakota.

Joan Horn

Subscribed and sworn to before me this 26th day of October, 1977.

Carlene Bentley

Carlene Bentley, Notary Public
Cass County, North Dakota
My commission expires: 1-31-79